STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Saad, P.J.; Donofrio and Gleicher, J.J.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its LOCAL 6000; MICHIGAN CORRECTIONS ORGANIZATION, SEIU LOCAL 526M; MICHIGAN PUBLIC EMPLOYEES, SEIU LOCAL 517M; MICHIGAN STATE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 5,

Plaintiffs/Appellants,

v.

NATALIE YAW, EDWARD CALLAGHAN, and ROBERT LABRANT, in their official capacities as Members of the Michigan Employment Relations Commission; RICHARD "RICK" SNYDER, in his official capacity as Governor of the State of Michigan; WILLIAM D. SCHUETTE, in his official capacity as Attorney General of the State of Michigan; and STATE OF MICHIGAN,

Defendants/Appellees.

Supreme Court No. 147700

Court of Appeals No. 314781

THE APPEAL INVOLVES A RULING THAT A PROVISION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

BRIEF ON APPEAL
MICHIGAN CIVIL SERVICE COMMISSION (AMICUS CURIAE)

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Other Authorities

STATEMENT OF JURISDICTION

The Civil Service Commission agrees with the Plaintiffs'/Appellants' Statement of Jurisdiction. Represented by counsel acting as Special Assistant Attorneys General, the Commission hereby submits this Brief on Appeal under MCR 7.306(D)(2).

STATEMENT OF QUESTION INVOLVED

WHETHER 2012 PA 349, WHICH AMENDED THE PUBLIC EMPLOYMENT RELATIONS ACT ("PERA"), IS UNCONSTITUTIONAL AS APPLIED TO STATE CLASSIFIED CIVIL SERVANTS IN THAT IT VIOLATES ARTICLE 11, § 5 OF MICHIGAN'S CONSTITUTION BY INTRUDING INTO THE EXCLUSIVE SPHERE OF AUTHORITY OF THE CIVIL SERVICE COMMISSION.

Plaintiffs/Appellants answer: Yes.

Civil Service Commission answers: Yes.

Defendants/Appellees answer: No.

Court of Appeals answered: No.

This Court should answer: Yes.

"The Civil Service Commission by the constitutional grant of authority is vested with plenary powers in its sphere of authority. Since that grant of power is from the Constitution, any executive, legislative or judicial attempt at incursion into that 'sphere' would be unavailing." *Council No 11, AFSCME, AFL-CIO, et al v Michigan Civil Service Comm*, 408 Mich 385, 408; 292 NW2d 442 (1980) (citations omitted).

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Michigan Civil Service Commission ("Commission") possesses exclusive constitutional authority to determine all conditions of employment for civil servants, including whether to implement an "agency shop" workplace, because it "has plenary and absolute powers in its field." See, e.g., *Viculin v Civil Service Commission*, 386 Mich 398, 398; 192 NW2d 449 (1971); *Council No 11*, 408 Mich 385; *Dudkin v Michigan Civil Service Commission*, 127 Mich App 397; 339 NW2d 190 (1983). Thus, it is the Commission's prerogative whether to maintain or eliminate an agency shop – not that of the Legislature, Defendants, or courts.

Public Act 349 of 2012 ("Act 349") amended the Public Employment Relations Act ("PERA") to prohibit mandatory payments to unions as conditions of employment for some public employees. Every past Michigan appellate court to have addressed the question had concluded that PERA does not apply to the Commission. Yet, a split panel of the Michigan Court of Appeals (hereinafter the "COA majority") held that this latest PERA amendment applies to change the conditions of employment and labor-relations system for classified employees. To reach its anomalous conclusion, the COA majority invented a new rule of law contrary to the constitution – that the Commission and the Legislature somehow "share[] responsibility" to regulate conditions of employment for classified civil servants. But as this Court and the Attorney General's Office have concluded many times, "plenary" means "plenary." And the new rule of law concocted by the COA majority finds no support in the

seven decades of Michigan jurisprudence since the people enshrined the Commission's authority in the constitution.

Although the COA majority professes that its holding is limited, it has warped constitutional history and distorted previous case law – in unprecedented fashion – to make the Commission subservient to the Legislature's whims. Without legitimate basis, the COA majority strips the Commission's plenary authority over conditions of employment and applies PERA to the state classified service for the first time. That the people in 1940 and 1963 sought, as the COA majority suggests, to clutter the Constitution with a paper-tiger Commission that could only wait for the next legislative attempt to further declaw it is absurd and ahistorical.

The Commission respectfully requests that this Court reverse the Court of Appeals and preserve what the constitution provides: only the Commission has authority to regulate conditions of employment for classified civil servants, including whether to maintain or eliminate an "agency shop" workplace.

II. STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Plaintiffs' briefs and the Commission's previous *amicus* brief filed in support of the Plaintiffs' Application for Leave to Appeal address at length the material proceedings in this case, including the revisionist historical and legal assumptions behind the COA majority's opinion and the Defendants' theories of the case. The Commission's previous *amicus* brief also includes a lengthy recitation of the creation of the Commission as a constitutional body with unique, constitutional powers to govern the classified civil service and keep the Legislature out of the civil service. And it includes a detailed summary of 70 years of Michigan appellate courts and Attorneys General concluding that the Commission has plenary and absolute powers over conditions of employment for classified civil servants. Rather than restate that historical

background, with which the Court is intimately familiar at this point, the Commission here briefly emphasizes how the COA majority's decision stands the primary rules of constitutional interpretation on their head by inventing a meaning unrecognizable to the ratifiers' common understanding.

III. ARGUMENT

Although Act 349 bans some agency shop agreements in the public sector, it cannot constitutionally ban "agency shops" within the classified civil service. Neither the Constitution nor this Court's decisions interpreting it support the COA majority's conclusion that suddenly, after 70 years, the Commission's plenary authority to regulate conditions of employment is subservient to the Legislature's general powers over conditions of employment.

A. Article 11, § 5 divests legislative authority to regulate classified conditions of employment.

After a failed experiment in the 1930s with a statutory civil service system (see Public Act 346 of 1937, as later amended by Public Acts 97 and 245 of 1939), Michigan's citizens in 1940 stripped the legislature's power to regulate conditions of employment for classified state employees and placed that authority with a new constitutional Commission. Const 1940, Art 6, § 22. In 1963, the citizens affirmed the Commission's unique plenary powers and added a new provision explicitly denying any legislative authority to regulate classified labor relations. Const 1963, Art 11, § 5 and Art 4, § 48. For 70 years, *every* appellate court and Attorney General reviewing the Commission's specific authority under state law over classified conditions of employment and labor relations found it *plenary* and *absolute* in those spheres. Until the COA majority here, no court has ever concluded that the Commission *shares* this authority.

The COA majority asserts that the fundamental purpose of creating the Commission in 1940 was to "provide for an unbiased commission to promulgate and enforce rules to assure a

merit-based system of government hiring." *COA Majority*, p 5. Of course, the actual purpose of the citizen initiative was to *constitutionalize* the Commission with plenary powers to prevent further legislative thwarting of a merit system. The statutory system created in 1937 was soon gutted by Public Acts 97 and 245 of 1939. Five legislators introduced PAs 97 and 245.[1] The Defendants' Brief cites and relies upon the opinions of all five civil-service opponents on what powers the Commission *should* have. *Defendants' Brief*, p 27. That 1939 legislative session saw half of state positions made available for patronage appointments and the Commission and its director stripped of much of their budget and powers. Those five lost this battle, and their preference for legislative governance of civil service has been rejected by Michigan's citizens twice and by the Courts and Attorneys General for decades.

The Commission's specific grant of authority over classified conditions of employment – made in 1940 and affirmed in 1963 – has always been viewed as *plenary* and *absolute* within that sphere. And the Commission's previous *amicus* brief cited myriad appellate opinions reiterating this universal understanding. See, e.g., *Council No 11*, 408 Mich at 408; *Viculin*, 386 Mich at 398; *Groehn v Corporations & Securities Comm*, 350 Mich 250, 259; 86 NW2d 291 (1957); *Plec v Liquor Control Comm*, 322 Mich 691, 694; 34 NW2d 524 (1948); *Reed v Civil Service Comm*, 301 Mich 137; 3 NW2d 41 (1942) (Chandler, J, Concurring); *Attorney General v Civil Serv Commn*, unpublished opinion per curiam of the Court of Appeals, issued January 8, 2013 (Docket No. 306685) (2013 WL 85805) (2013) (Exhibit 2); *AFSCME Council 25 v State Employees' Retirement System*, 294 Mich App 1, 18; 818 NW2d 337 (2011); *Hanlon v Civil Service Comm'n*, 253 Mich App 710, 717; 660 NW2d 74 (2002); *Womack-Scott v Dep't of Corr*,

[1] Representatives Nelson A. Miles, Charles F. Sundstrom, Elton R. Eaton, and Edson V. Root (1939 Journal of the House 393-94) and Senator D. Hale Brake (1939 Journal of the Senate 314).

246 Mich App 70, 79; 630 NW2d 650 (2001); *Crider v Civil Service Comm*, 110 Mich App 702, at 723; 313 NW2d 367 (1981).

Attorneys General have similarly identified the Commission's power as complete, OAG, 1941, No 20212, p 187 (June 5, 1941); OAG, 1948-49, No 926, p 219 (May 19, 1949); as superseding general employment legislation, OAG, 1943, No 1318, p 531 (September 20, 1943); as abrogating the state's labor law, OAG, 1947-48, No 5133, p 89, 91 (October 23, 1946); and as a portion of the state's sovereignty conferred by the people, OAG, 1953-54, No 1794, p 358 (June 22, 1954). Even the Legislature acknowledged the lay of the land when formally repealing the "obsolete and inoperable" statutory system. Public Act 29 of 1944.

In 1963, the people of Michigan retained the Commission and its broad, exclusive powers.[2] The Commission's previous brief to this Court described in depth the Con-Con debates over whether to amend Article 11, § 5 to introduce some oversight by the Legislature. In the end, the people ratified only a limited supermajority veto over increases in rates of compensation. This narrowly drawn Legislative oversight over the Commission – the only such oversight – ensured that the Legislature's power "could not be exercised readily" and only "in the event of a real abuse." 1 Official Record, Constitutional Convention 1961, p 652 (further noting that "The amendment [the Legislative veto over increases in compensation] is offered in the spirit of providing accountability to the legislature and...importantly to the people by a fourth branch of our government."). Delegate James Maxwell Shackleton explained:

[2] From the 1941 version to the 1963 version of Article 11, § 5, the sole change to the language conferring the Commission's plenary authority over "conditions of employment" was changing a reference to "state civil service" to read "classified service." This change was made throughout the amendment and provides no basis to diminish the Commission's authority over conditions of employment it enjoyed from 1941 to 1963, as recognized by Michigan courts and Attorneys General.

> This article is generally conceded to be a statutory provision in our constitution which set up a civil service commission with **a large degree of independence from the legislative and executive branches** of our state government. The commission's powers, after much judicial litigation, impinged upon areas of activity **normally associated with the executive and legislative branches**.

Id. (emphasis added).

The spirited debate over allowing *any* legislative role over the classified service undercuts the COA majority's theory that the Legislature enjoyed residual authority over conditions of employment for civil servants. See 2 Official Record, Constitutional Convention 1961, pp 662-67, 2909-11, 3187-92. To invent a new rule of "shared responsibility," the COA majority ignored not only this historical context, but also the decades of Michigan jurisprudence interpreting it.

B. The COA majority uses flawed arguments or irrelevant authority to conclude that the Legislature's power over conditions of employment is superior to the Commission's.

The COA majority asserts that Act 349 regulates conditions of employment under Article 4, § 49. *COA Majority*, p 10. It cites no case law supporting its theory that the Commission's plenary authority over classified conditions of employment in Article 11, § 5 is subservient to the Legislature because none exists. The majority instead relies on four flawed bases: (1) unsupported diminution of the word "regulate"; (2) misdirection to unrelated case law; (3) misinterpretation of Article 11, § 5; and (4) novel, unrecognizable canons of constitutional construction that flout well-established ones.

First, using its own cobbled-together definition, the COA majority asserts that a power to "regulate" is different from and lesser than a power to "enact." The COA majority ignores that "regulate" is used throughout the state and other constitutions to grant wide *plenary* authority. See, e.g., 1963 Const art 2, § 4 and art 4, § 50; US Const, art I, § 8, clause 3. All prior Michigan

appellate court decisions interpreted "regulate" as accomplishing this goal. The COA majority's unsupported interpretation is contradicted by numerous previous decisions of this Court. See, e.g., *House Speaker v Governor*, 443 Mich 560, 587 n 33; 506 NW2d 190 (1993) ("Article 11, § 5 gives the [Commission] (an entity of the *executive* branch) the *legislative* power to establish pay rates and regulate conditions of employment in the classified service.") (emphasis original). The COA majority also forgets that the people created a constitutional Commission to end legislative mischief and used several different verbs to empower it, including others that the majority acknowledges grant plenary power. *COA Majority*, p 12. The COA's majority's folly is exposed when it concedes that granting authority to "make rules and regulations" confers plenary authority, but asserts that grants of powers to "regulate" do not. *Id.*

Second, the COA majority focuses on case law involving separate constitutional authorities of the legislature. When these distinct *constitutional* grants of power over elections, civil rights, or public health must be harmonized with the Commission's powers, courts allow their legislative exercise to affect classified conditions of employment. In these few instances where legislative acts have affected the classified service, they have *never* been based on the Legislature's authority to regulate conditions of employment generally under Article 4, § 49, as the COA majority concludes here; they have always been under other *specific* constitutional grants of authority. Here, the conflicting constitutional provisions address authority over "conditions of employment." The cases cited by the COA majority provide no support for abandoning the well-settled understanding of the constitution's specific allocation to the Commission of authority to control classified conditions of employment.

Third, the COA majority makes much of the explicit classified-service exception in Article 4, § 48, which Article 4, § 49 lacks. The Con-Con delegates described both provisions as

unneeded and not changing the Legislature's authority. 2 Official Record, Constitutional Convention 1961, pp 2337-2342. Article 4, § 48 was new in 1963, so an explicit exception reflecting the existing balance of power was included. And the people in 1963 knew how to place a legislative check on the Commission's powers in Article 11, § 5 by inserting the legislative 2/3 veto over compensation increases. No historical evidence suggests any intent in 1963 to change the Commission's plenary authority over conditions of employment. If the Commission's powers were intended to be so fundamentally curtailed, some contemporaneous evidence would be expected. Courts' failure for fifty years to unearth the COA majority's reimagining of the common understanding is strong evidence of its error.

Fourth, the COA majority ignored and distorted well-settled canons of constitutional construction. Every provision in the constitution must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another. See, e.g., *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). If there is a conflict between general and specific provisions in a constitution, the more specific provision must control in a case relating to its subject matter:

> When there is conflict between general and specific provisions in a constitution, the specific provision must control. This second rule of construction is grounded on the premise that **a specific provision must prevail *with respect to its subject matter*, since it is regarded as a limitation on the general provision's grant of authority**. The general provision is therefore left controlling in all cases where the specific provision does not apply.

Advisory Opinion on Constitutionality of 1978 PA 426, 403 Mich 631, 639-640; 272 NW2d 495 (1978) (emphasis added).

Article 11, § 5 gives the Commission the specific power to regulate conditions of employment in the classified service; Article 4, § 49 gives the Legislature only general power to enact laws regarding conditions of employment (without stating *whose* employment conditions

are being regulated). The "specific/general" canon of construction is particularly apropos here because both Articles regulate "conditions of employment" – that is, they conflict by their plain terms. Because Article 11, § 5 focuses on a specific group of employees' "conditions of employment" (i.e., classified civil servants) and Article 4, § 49 does not, Article 11, § 5 is more specific and, thus, controlling over the subject matter.

The COA majority ignores this well-established rule of constitutional construction and invents a new one by stating curiously that: "The [Commission's] general/specific dichotomy, however, would be more accurately characterized as a broad/narrow dichotomy." *COA Majority*, at p 12. It then states that the Commission "possesses narrow power" and, thus, "[t]he [Commission's] power to act in its limited sphere...does not trump the Legislature's broader constitutional powers." *Id.* The COA majority's contrived rule of construction finds no basis in case law and none is cited. It should not be permitted to flippantly dismiss a well-established rule of constitutional construction and invent a new one by re-characterization."[3]

Moreover, history and circumstances must inform determining the most reasonable interpretation of constitutional language:

> In construing constitutional provisions where the meaning may be questioned, the court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished.

Kearney v Bd of State Auditors, 189 Mich 666, 673; 155 NW 510, 512 (1915). Historical context cannot be ignored here to turn Article 11, § 5 and Article 4, § 49 – mostly unchanged from the previous constitution – on their head:

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[3] Nor does the COA majority attempt to explain how its invented "narrow/broad" characterization is materially different from the "specific/general" dichotomy universally recognized and understood by Michigan courts.

> Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power. In these cases we thought we could arrive at it from the public history of the times.

People ex rel. Bay City v State Treasurer, 23 Mich 499, 506 (1871).

Further, "if conflicting constitutional provisions cannot be harmonized, the provision adopted later in time controls." *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich at 643 (citations omitted). Article 4, § 49 reenacts a provision originally adopted in 1908, while Article 11, § 5 continues a provision originally adopted in 1940. Again, the COA Majority opinion ignores this rule of construction.

In sum, the history of the Commission's creation, canons of constitutional interpretation giving precedence to specific and newer provisions, and stare decisis all demand rejection of the COA majority's oxymoronic doctrine of quasi-plenary power.

C. Article 4, § 48 reflects an intent to leave the Legislature no authority to regulate classified labor law.

Article 4, § 48 was added to the constitution in 1963. The convention record reflects the Delegates' understanding that "Whatever powers the legislature had they still possess, and it doesn't change it, either increase it or diminish it, in any way." 2 Official Record, Constitutional Convention 1961, pp 2338. The Legislature had already acted on public-employee labor relations. "We are simply relating that they have the power to do that." *Id.* The Con-Con Delegates also clarified that "The state civil service is exempted because the constitution has specific provisions for the operation of the state civil service." *Id.* One cited law on employee

relations enacted before Article 4, § 48's specific authorization was the Hutchinson Act, Public Act 336 of 1947. *Id.* Both PERA and Act 349 subsequently amended the Hutchinson Act. After five decades of the courts always viewing the Hutchinson Act/PERA as not applying to the classified service, it is unclear why it should now.

Yet, the COA majority declares that "[c]learly, PA 349 does not address resolution of public employee labor disputes, and therefore does not come within the § 48 restriction." *COA Majority*, p 7. This adjudication by conclusory statement offers no support beyond the word "clearly." Defining the relationship between employees and labor organizations is a fundamental element of a system of resolving employment disputes. What *is* clear is that, based on Article 4, § 48, Michigan courts have repeatedly held that:

(1) PERA – which Act 349 amends – does not apply to classified employees, *Bonneville v Michigan Corrections Org,* 190 Mich App 473, 477; 476 NW2d 411 (1991); *SEIU v State Racing Commissioner*, 27 Mich App 676, 681; 183 NW2d 854 (1970); *Welfare Employees Union v Civil Service Comm,* 28 Mich App 343; 184 NW2d 247 (1970) lv den 384 Mich 824; see also *Central Michigan Univ Faculty Assoc v Central Michigan Univ*, 404 Mich 268, 280-81; 273 NW2d 21 (1977) ("Clearly, the PERA was intended to cover all public employees except for civil service employees specifically excluded by constitutional provision."); *Board of Control of Eastern Michigan Univ*, 384 Mich 561, 566; 184 NW2d 921 (1971) ("The public policy of this state as to labor relations in public employment is for legislative determination. The sole exception to the exercise of legislative power is the state classified civil service, the scheme for which is spelled out in detail in Article 11 of the Constitution of 1963.");

(2) the Commission's plenary authority extends to regulating collective bargaining, *Council No 11*, 408 Mich 385; and

(3) the Commission can authorize an agency shop, *Dudkin*, 127 Mich App 397.[4] The COA majority's opinion flips these decisions on their head as well.

The COA majority relies on Section 4a of PERA stating that it applies to classified employees "in so far as the power exists in the legislature to control employment by the state or the emoluments thereof." See MCL 423.204a. The precise meaning of Section 4a, enacted in 1947, has never been addressed by Michigan's appellate courts, but even if it could be interpreted as an attempt to reserve authority to the Legislature over civil servants, the provision – qualified by the phrase "in so far as" – merely recognizes (as already confirmed by 1947) the Legislature's inferior role over the classified civil service. See, e.g., *Reed*, 301 Mich at 161, 164; Unpublished opinion of the Attorney General (No. 18,505, January 11, 1941) (from Herbert J. Rushton to Vernon J. Brown) (Exhibit 14); OAG, 1941, No 20212, p 187 (June 5, 1941) (Exhibit 15); OAG, 1943, No 1318, p 531 (September 20, 1943) (Exhibit 16); OAG, 1947-48, No 5133, p 89, 91 (October 23, 1946) (Exhibit 6). Plus, to the extent Section 4a created any confusion over the Legislature's role, the people subsequently adopted Article 4, § 48 (and Article 11, § 5) in 1963 clarifying the Commission's superior and exclusive role. To read Section 4a of PERA as the COA majority has elevates a legislative pronouncement to constitutional preeminence. No Legislature or court has the power to do that.

Nonetheless, the COA majority appears to suggest remarkably that the Legislature can legitimize any unconstitutional action simply by passing a law granting itself that authority. No rule of constitutional construction justifies that conclusion. See *Matter of Michigan Employment Relations Commission's Order*, 406 Mich 647, 664-65; 281 NW2d 299 (1979) (explaining that a

[4] In *Dudkin* in 1983, the Attorney General advocated successfully that the creation of an "agency shop" arrangement was *within* the Commission's sole, plenary powers.

statutory provision cannot grant the Legislature authority in excess of its underlying constitutional authority); *Livingston County Bd of Social Services v Dep't of Social Services*, 208 Mich App 402, 408; 529 NW2d 308 (1995) ("Because the commission's grant of power is derived from the constitution, its valid exercise of power cannot be taken away by the Legislature."). Section 4a of PERA does not authorize or require any part of PERA to apply to the classified service. Only the constitution can do that.

Furthermore, the COA majority's reading of "laws providing for the resolution of disputes concerning public employees" in Article 4, § 48 is unprecedentedly narrow. PERA, a statute repeatedly found enacted under Article 4, § 48, comprehensively addresses public labor law. See, e.g., *In the Matter of the Petition for a Representation Election Among Supreme Court Staff Employees*, 406 Mich 647, 668; 281 NW2d 299 (1979). This includes not just dispute-resolution procedures, but also establishing a system's ground rules and contours: permitted subjects of bargaining; prohibited conduct; union representation; and relationships between employees, employers, and labor organizations.

The Defendants' own websites have conceded that PERA does not apply to the classified service.[5] In fact, in *Michigan Coalition of State Employees Unions, et al v State of Michigan, et al.* (Supreme Court No. 147758), the other case pending before this Court examining the Commission's constitutional powers, the State of Michigan readily admits that "...PERA...*does not apply* to classified State employees." *Defendants' Brief to the Supreme Court in Michigan Coalition of State Employees Unions*, p 45 (emphasis original). The COA majority's conclusion would, nonetheless, deny that dispute resolution means anything beyond procedures for resolving labor disputes and thwart the Commission's authority over regulating these conditions

[5] See http://www.michigan.gov/snyder/0,1607,7-277-57738_57679_57726-249954--,00.html.

of employment. But Michigan courts have repeatedly held otherwise. For example, the Commission has been found to have plenary authority to make labor-relations determinations over collective bargaining generally, *Council No 11*, 408 Mich 385; over bargaining-representative elections, *SEIU Local 79*, 27 Mich App 676; and over ancillary disputes outside the employee-employer relationship, *Bonneville*, 190 Mich 473. The COA majority's stilted attempts to limit the Commission's authority over classified labor law ignore 50 years of case law and Article 4, § 48's plain meaning.

D. Agency-shop fees are conditions of employment within the commission's plenary authority.

To conclude, as the COA majority did, an agency shop arrangement approved by the Commission as "a condition of continued employment" is not a "condition of employment" regulated by the Commission under Article 11, § 5 strains credulity. The COA majority asserted that the Commission cannot regulate agency-shop fees because they are conditions *for* employment and not conditions *of* employment. The only case previously suggesting such a distinction concluded that the Commission had exceeded its authority by prohibiting off-duty activities. *Council No 11*, 408 Mich 385. "Conditions for employment" in *Council No 11* referred to conditions unrelated to the employment relationship. As the Court of Appeals dissent noted, the Commission frequently regulates conditions of employment that are also conditions for employment. And the courts have upheld the Commission's power over conditions *for* employment, including: passing examinations, *Reed*, 301 Mich 137; striking prohibitions, *Welfare Employees Union*, 28 Mich App 343;; experience requirements, *Fink v Civil Service Comm*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2011 (Docket No. 299124) lv den 491 Mich 920; 812 NW2d 739 (2012) (2013 WL 5965790) (Exhibit 24); and drug testing, *UAW, Local 6000 v Winters*, 385 F3d 1003 (CA 6, 2004).

Of course, this Court in *Council No 11* said that "The power to... regulate all conditions of employment in the classified service[] is indeed a plenary grant of power.... We do not question the commission's authority to regulate employment-related activity involving internal matters such as... collective bargaining...." 408 Mich at 406. The COA majority misrepresents *Council No 11* and conveniently ignores its express conclusions on the Commission's plenary authority over collective bargaining matters, which includes the establishment of agency shop.[6]

E. The Commission's rules on agency shop validly exercise its constitutional authority.

The COA majority opined that agency shops pose First Amendment concerns, but did not find – as the Defendants assert – the Commission's rules authorizing them unconstitutional. The constitutionality of agency-shop fees is well-established. Indeed, the U.S. Supreme Court has concluded that public-sector agency shop arrangements do not violate First Amendment rights. See, e.g., *Ellis v Brotherhood of Ry, Airline, and SS Clerks, et al*, 466 US 435, 439; 104 S Ct 1883 (1984) ("[Plaintiffs] do not contest the legality of the union shop as such, nor could they.") citing *Railway Employees v Hanson*, 351 US 225; 76 S Ct 714 (1956). Until the COA majority raised the issue *sua sponte*, no party suggested that the Commission's agency shop Rules infringed on any person's First Amendment rights. Thus, the COA majority's conclusion that the Michigan Legislature must be permitted to step in to "remov[e] political and ideological conflict from public employment" is not based in fact or reality. *COA Majority* at p 16. Nor is it

[6] The COA majority's interpretation of the interplay between Article 4, §49 and Article 11, §5 vis-a-vis "conditions of employment" is inherently flawed in light of its conclusion that agency fees are "conditions for employment." Specifically, it does not explain how a Commission Rule governing "agency shop" agreements is *not* a "condition of employment" under Article 11, § 5, as it concludes; yet, according to the COA majority, the Legislature's attempt to govern "agency shop" agreements *is* a "condition of employment" under Article 4, § 49. No rule of constitutional construction could explain the inherent inconsistency in this conclusion.

grounds under established Michigan law for Michigan courts to limit the Commission's plenary, constitutional authority under the guise of "public policy." See *Hanson*, 351 US at 233-234 (Supreme Court recognized that "the question [of whether to create a union shop] is one of policy with which the judiciary has no concern"; and the entity "acting within its constitutional powers, has the final say on policy issues."). Michigan's people have entrusted general labor- and employment-law policymaking for the classified service to the Commission. The Commission could amend Chapter 6 of its rules to track the terms of PA 349, but that discretion is constitutionally assigned by the people to the Commission.

The COA majority and Defendants also declare incorrectly that Act 349 ended compulsory union support for all public employees. Section 10(4) of the Act, however, allows agency shops for police and fire employees. If Act 349 was meant to protect First Amendment rights, the compelling governmental interest in denying those rights to public-safety officers is unclear. As the Court of Appeals dissent notes, the narrow tailoring of this exception suggests concerns other than constitutional ones motivated Act 349.

F. No constitutional change justifies abandoning seven decades of case law.

In 1965, the Legislature allowed most public employees to collectively bargain. The Commission waited until 1980 to extend similar rights to classified employees. In the interim, when state employees attempted to unionize, the courts denied that request because "[t]he people of Michigan deemed it necessary for the commission to retain full control over state classified civil service employees...." *Welfare Employees Union,* 28 Mich App at 353. Just as PERA's grant of bargaining rights did not extend to classified employees then, PERA's latest prohibition of agency shops for some public employees does not now. The Commission may someday reach

a similar decision for the classified service on agency shops, but our constitution entrusts that decision exclusively to the Commission.

All previous Michigan jurisprudence on Article 4, § 48 and Article 11, § 5 affirms the Commission's plenary power over classified labor and employment law. The Defendants belittle this as "so-called 'plenary' authority," *Defendants Brief*, p 21, but this Court has repeatedly affirmed the Commission's authority as plenary without that qualification. *Reed*, 301 Mich at 161, 164 (Chandler, concurring) ("The amendment creating a constitutional body to supersede all existing personnel agencies, vests in the civil service commission an exclusive authority and plenary power to... regulate all conditions of employment in the State civil service.... Unquestionably the civil service commission is a constitutional body possessing plenary power."); *Plec*, 322 Mich at 694 ("[T]he civil service commission by the above mentioned constitutional amendment is vested with plenary powers in its sphere of authority."); *Groehn*, 350 Mich at 259 ("Moreover, it is highly questionable if, under our constitutional amendment, which entrusts to civil service the regulation of 'all conditions of employment in the State civil service' (Const 1908, art 6, § 22), it could so strip itself of its plenary powers."); *Viculin v Dept of Civil Serv*, 386 Mich at 398 ("The Michigan Civil Service Commission has plenary and absolute powers in its field."); *Council No 11*, 408 Mich at 406 ("The power to... regulate all conditions of employment in the classified service[] is indeed a plenary grant of power."). The COA majority was duty-bound to respect this long-standing designation, yet ignored it.

IV. CONCLUSION

The battles to eliminate the spoils system from Michigan's state service were real and protracted. Michigan's citizenry took extraordinary constitutional measures to improve the administration of the civil service by drawing clear lines between the Commission's authority

and the Legislature's. Courts have consistently recognized this division of authority since 1941. The movement's success and historical basis may be unremembered as the abuses fade from our consciousness. Someday, the people may alter this arrangement through further constitutional amendment, but they have not done so yet. Until they do, the COA's majority's unsupported rewriting of our constitutional order cannot stand.

Respectfully submitted,

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